United States Court of Appeals

for the Second Circuit

APPENDIX

76-7059

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

RELAXATION PLUS COMMODORE, INC.,

B

Plaintiff-Appellant,

- against -

REALTY HOTELS, INC., THE HONORABLE HOWARD THOMPSON, Individually and as Administrative Judge of the Civil Court of the City of New York, and "John Doe" (Fictitious name) Individually and as City Marshal of the City of New York,

Defendants-Appellees.

- X

Docket No. 76-7059

APPENDIX

Herbert S. Kassner

of Counsel

KASSNER & DETSKY
122 East 42nd Street
New York, N. Y. 10017

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INDEX

Docket Entries

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PLAINTIFFS

RELAXATION PLUS COMMODORE, INC.

DEFENDANTS Werker, J.

REALTY HOTELS, INC.
THOMPSON, Edward (The Honorable) Individually and as Administrative Judge of the CIVIL COURT OF THE CITY OF NEW YO
"JOHN DOE" (fictitious name) Individually and as City Marsl of the CITY OF NEW YORK.

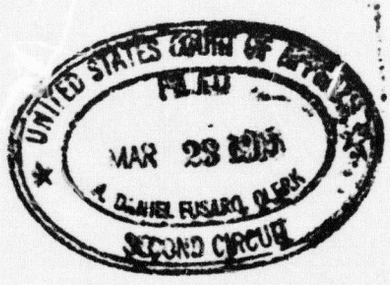
CAUSE 2/20 LS

CIVIL RIGHTS: 42:1983, 1985, 1986, etc.
suppression of facts, etc. for the purpose of evicting pltf.

ATTORNEYS

Kassner & Detsky, P.C.
122 East 42nd St., NYC 10017
682-6600

deft. Realty Hotels, Inc.
Wohl, Lipton, Olwe, Stettner & Becker
10 E.40St, NYC 10016



CHECK HERE IF CASE WAS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	JAN 26 1976				

Relaxation Plus Commodore, Inc. v. Realty Hotels Inc., et.al.

DATE	NR.	PROCEEDINGS
01-26-76	1	Filed complaint - issued summons.
01-28-76	2	Filed defts memorandum of law in opposition to motion to convene a Three-Judge Court,
01-27-76	--	Hearing held on motion for 3 Judge Court and injunctive relief. Decision reserved. -- Werker, J.
01-27-76	3	Filed pltfs. affdt. and OSC for an order appointing and convening a 3 judge court to 28USC2201 for declaratory judgment,etc.;enjoin defts,etc.;ORDERED that personal service by made by Jan.26,1976 by 5:30pm. Werker,J.
02-05-76	4	Filed deft. Realty Hotel,Inc. memorandum of law.
02-06-76	5	Filed OPINION #43847--Injunctive relief is denied and the convocation of a 3 judge court is denied. The complaint is dismissed. So ordered, Werker,J. m/n
02-20-76	6	Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from Court's final order of 2-6-76 (dated 2-4-76) -- copies mailed to: Wohl Lipton Loewe Stettner Becker and Krim, Esqs. and Louis J. Lefkowitz, Atty. Gen'l, State of NY.

A T... C...
RAYMOND F. ... U.S.D.C., Clerk
By M. Sid
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

RELAXATION PLUS COMMODORE, INC.,

Plaintiff,

- against -

REALTY HOTELS INC., THE HONORABLE EDWARD THOMPSON,, Individually and as Administrative Judge of the CIVIL COURT OF THE CITY OF NEW YORK, and "JOHN DOE" (fictitious name) Individually and as City Marshal of the CITY OF NEW YORK,

Defendants.
- -x

COMPLAINT

1. JURISDICTION

This complaint for injunctive and declaratory relief is filed, and the jurisdiction of this Court is invoked, pursuant to the provisions of 28 U.S.C. Sections 1331, 1332, 1343, 2201, 2202, 2281 and 2284 and 42 U.S.C. Sections 1983, 1985 and 1986 and Rules 57 and 65 of the Federal Rules of Civil Procedure.

(a). The matter in controversy arises under the Constitution and laws of the United States of America;

(b). The matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs;

(c). This is an action to redress the deprivation, under color of state law, of rights, privileges and immunities secured to the plaintiff by the Constitution of the United States

of America;

(d). This is an action to secure equitable relief for the protection of plaintiff's civil rights;

(e). This is an action to have declared unconstitutional on its face and as applied and to enjoin the enforcement, operation, and execution of laws of the State of New York which are codified and appear as Section 711-5 of the Real Property Actions and Proceedings Law, Section 352 of the Multiple Dwelling Law, Section 231-1 of the Real Property Law and Section 230.00 et. seq. of the Penal Law (McKinney's Consolidated Laws of New York), hereinafter referred to as the "Statutes".

2. PARTIES

(a). Plaintiff is a New York Corporation and the Lessee and operator of a liesure health spa located in the Commodore Hotel on the Northwest corner of 42nd Street and Lexington Avenue in the City, County and State of New York.

(b). Defendant Realty Hotels, Inc., is, upon information and belief, the owner of the said Commodore Hotel and the landlord of plaintiff.

(c). Defendant, the Hon. Edward Thompson, is the administrative head of the Civil Court of the City of New York, and, as such, is responsible for the administration of the said Civil Court of the City of New York and the landlord and tenant Parts in the said Court which have jurisdiction over summary

proceedings commenced under R.P.A.P.L. 711-5.

(d). Defendant is a City Marshal of the City of New York and as such is responsible for the service and execution of warrants of eviction issued out of the Civil Court of the City of New York in summary proceedings.

(e). Plaintiff transacts business and is found within the Southern District of New York.

3. STATUTES IN ISSUE

Section 230.00 of the Penal Law provides as follows:

> A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee. Prostitution is a class B Misdemeanor.
>
> (see balance of article annexed hereto)

Section 352 of the Multiple Dwelling Law provides as follows:

> "If a multiple dwelling, or any part thereof, shall be used as a house of prostitution or assignation with the permission of the lessee or his agent, the lease shall be terminable at the election of the lessor, and the owner shall be entitled to recover possession of said premises by summary proceedings."

Section 231-1 of the Real Property Law provides as follows:

> "Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises shall thereupon become void, and the landlord of such lessee or occupant may enter upon

the premises so let or occupied."

Section 711-5 of the Real Property Actions and Proceedings Law provides as follows:

> "...a special proceeding may be maintained under this Article upon the following grounds: ... 5. The premises, or any part thereof, are used or occupied as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture or other illegal business."

4. FIRST COUNT

1. Plaintiff is the lessee and operator of a leisure health spa on the mezzanine floor of the Commodore Hotel on the northwest corner of Lexington Avenue and 42nd Street in the City, County and State of New York, which business has been lawfully operated continuously for a period in excess of three years free of any arrests or charge of criminal activity on its part or on the part of any of its servants, agents, or employees.

2. The aforesaid tenancy of plaintiff was established by lease agreement with defendant Realty Hotels, inc. dated March 28, 1972 which lease provides for a ten year term.

3. The said lease further provides in Paragraph "41" thereof for notice and opportunity to cure should the landlord, defendant Realty Hotels, Inc., believe that either plaintiff or its employees are engaging in lewd or lascivious activities.

4. The lease further provides in Paragraph "17" thereof

for five days notice and opportunity to cure in the event of any default on the part of plaintiff in fulfilling any of the covenants of the lease, for a three day notice of termination upon the failure of plaintiff, a tenant thereunder, to cure such noticed default, and for the right of landlord upon the termination of the said five and three day period to commence summary proceedings to dispossess tenant.

5. Upon information and belief, that heretofore and prior to July, 1974, defandant Realty Hotels, Inc. entered into an option with a prospective purchaser of the Commodore Hotel, the precise identity of the said purchaser being unknown to plaintiff at this time, except that the Trump real estate interests of the City of New York control the said purchaser, and the said prospective purchaser entered into an agreement with the Hyatt Hotel chain interests whereby a total and complete gutting and renovation of the Commodore Hotel would be undertaken for the purpose of creating a virtually new first class hotel on the site as a convention center on the East Side for the City of New York.

6. That it would be impossible to totally gut and renovate the Commodore Hotel without compensating plaintiff, who had, at the time, 7½ years remaining on its lease.

7. By reason of the foregoing, it became imperative that the defendant find ways and means to remove plaintiff from the premises prior to the expiration of plaintiff's lease term.

8. That by reason of the foregoing defendant Realty Hotels,

Inc., in conjuction with various attorneys, Wohl, Lipton, Loewe, Stettner, Becker & Krim, hired various private detective agencies and security consultants which upon information and belief were controlled and, in whole or in part, owned by one or more of the said attorneys, to evict the plaintiff from the premises on grounds of illegal occupancy which grounds would be established by the said attorneys in conjunction with their associated private detective firms.

9. That the aforesaid agreement and conspiracy involved the utilization of the statutes, the commission of crimes by the agencies, servants and/or employees of the said private detective agencies for the purpose of procuring evidence to be used in a summary proceeding against plaintiff, and suppression of the facts of alleged illegality through the date of trial in order to prevent plaintiff from investigating the alleged facts of illegality, locating witnesses to controvert same, and preparing informed cross examination for the purpose of controverting the said witnesses testin

10. That over a period of approximately six months in the year 1974 defendant Realty Hotels, Inc., through its coconspirators, sent a number of servants, agents and employees of its aforesaid private investigation firm coconspirator into the premises with instructions to violate Section 230.05 of the Penal Law of the State of New York and seek out sexual conduct for a fee from the

unsuspecting servants, agents and employees of the plaintiff at the plaintiff's premises, and thereby induce them to violate P.L. 230.00.

11. That the aforesaid paid private investigator did allegedly enter the premises of the plaintiff and allegedly pay a tip to various agents, servant and employees of plaintiff pursuant to an understanding that in return therefor such servants of plaintiff would have sexual contact with the said private investigators, all in violation of Section 230.05 of the Penal Law of the State of New York.

12. That the said private investigators entered the premises of the plaintiff and, in violation of Section 230.05 of the Penal Law, solicited and requested plaintiff's employees to engage with them in sexual conduct for a fee.

13. That defendant Realty Hotels, Inc. was advised in May of 1974 by the said private investigators that they were able to entrap employees of plaintiff into performing sexual acts in consideration of the promise by the said investigators of a large tip, yet defendant Realty Hotels, Inc. did not inform plaintiff, its tenant, of such alleged misconduct by plaintiff's employees, nor did defendant Realty Hotels, Inc. notify plaintiff of the alleged lewd and lascivious conduct on the demised premises in accordance with Paragraph "41" of the lease.

14. That, instead, defendant Realty Hotels, Inc. commenced a series of three summary proceedings under R.P.A.P.L 711-5,

seeking the eviction of plaintiff from the demised premises upon grounds of illegal conduct of employees in allegedly performing sexual activities with defendant Realty Hotels, Inc.'s paid private investigators.

15. That the first two such proceedings were dismissed or discontinued by defendant Realty Hotels, Inc.

16. That the third proceeding for summary eviction which was commenced by defendant Realty Hotels, Inc. against the plaintiff in the Civil Court of the City of New York set forth in its petition as the basis for the relief sought the following disjunctive conclusory pleading:

> "9. That the said demised premises the respondent, or with the knowledge and consent of respondent, as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for other illegal business or use in that the respondent, its agents, servants or employees, are using or occupying the said premises, or causing or permitting the said premises to be used and occupied, for the purposes of advancing, profiting from and promoting prostitution or knowingly permitting prostitution in the said premises; which prostitution consisted and consists of sexual conduct engaged in, for a fee, by persons in the employ of the respondent, with patrons of the respondent in said premises, said sexual conduct consisting of acts of fellatio, masturbation and physical contact with the unclothed genitals of patrons of the respondent for

purposes of sexual gratification."
(Underlining Supplied)

17. That none of the officers, directors or stockholders of the plaintiff were acquainted with the underlying basis for the aforesaid conclusory allegations in the petition of Realty Hotels, Inc.

18. On or about October 25, 1974, virtually on the date of the service of the petition and notice of petition in the said third summary proceeding, plaintiff served upon defendant Realty Hotels, Inc. a demand for a bill of particulars which sought, among other things, the names of plaintiff's employees alleged to have performed illegal acts, the nature of the illegal acts allegedly performed, the time and place of such performance, and the names of third persons with whom those alleged acts were performed.

19. That defendant Realty Hotels, Inc. did not serve its bill of particulars in the said summary proceeding until December 17, 1974 when same was served at approximately 10:00 A.M. in the courtroom of the Civil Court of the City of New York.

20. That the attorney for plaintiff therein immediately moved for a one day adjournment in order to enable plaintiff to investigate the allegations of the bill of particulars and thereby enable plaintiff to controvert the evidence of petitioner in said proceeding and locate witnesses to be called in its behalf.

21. That the trial Judge summarily denied the application

for the said one day adjournment and ordered the case to trial forthwith.

22. That the trial in the Civil Court in the City of New York was commenced by the selection of a jury at approximately 11:00 A.M. on the morning of December 17, 1974, less than an hour after the service by defendant Realty Hotels, Inc. of the said bill of particulars.

23. That petitioner in said proceeding, defendant Realty Hotels, Inc. herein produced six paid private detectives employed by a private detective agency which, upon information and belief, was wholly or partially owned by a member of the firm of the attorneys for petitioner in the said proceeding who, upon information and belief, had been employed by the said petitioner solely for the purpose of achieving the eviction of plaintiff herein from the demised premises.

24. That the said six paid witnesses of defendant Realty Hotels, Inc. testified in the said landlord and tenant proceeding that they had secured the performance of fellatio and masturbation upon their persons on nine occasions by eight separate employees of plaintiff over a period spanning approximately six months.

25. That during the said six month period over one hundred masseuses were employed by plaintiff in the premises and approximately nine thousand massages given.

26. That by reason of the vague pleading, the calculated

delay of defendant Realty Hotels, Inc. in serving its bill of particulars in the said landlord and tenant proceeding and by virtue of the denial by the trial Judge in the said proceeding of a one day adjournment sought by plaintiff, it was impossible for plaintiff to investigate the alleged facts of misconduct which had transpired over an approximate six month period, to prepare adquate cross-examination of the six paid witnesses of defendant Realty Hotels, Inc. and to prepare an adequate defense and produce witnesses in its own behalf.

27. That there was no evidence adduced at the trial that any of the officers, stockholders or directors of plaintiff knew of the alleged misconduct of their emplooees.

28. That the sole basis for attributing the alleged misconduct of plaintiff's employees to plaintiff was the testimony by one of the paid private detective witness of Realty Hotels, Inc. that a certain unnamed male was pointed out by a receptionist as the manager of the premises and that the said paid witness went outside the premises where the male was standing and engaged him in a conversation in which he was advised by the said alleged "manager" that fellatio and masturbation were available in the premises although intercourse was not.

29. That the aforesaid summary proceeding was initiated by Realty Hotels, Inc. without its having given any notice whatsoever to the plaintiff of the alleged illegal activity on the premises.

30. That during and after the commencement of the said

summary proceeding, defenant Realty Hotels, Inc. reaffirmed the lease by accepting rent from plaintiff.

31. That notwithstanding the foregoing, plaintiff was found to have permitted prostitution on the premises and a judgment of eviction was rendered against plaintiff which judgment was affirmed unanimously the Appellate Term of the Supreme Court of the State of New York, First Department with leave to appeal to the Appellate Division having been subsequently denied by that body. That the Appellate Division, First Department, after denying plaintiff leave to appeal, upon reargument, granted leave to appeal, but then affirmed the decision below on the opinion of the Appellate Term.

32. That the foregoing, undertaken under color of State law, served to deny plaintiff herein its due process rights under the Fourteenth Amendment by hiding from plaintiff the alleged facts underlying the summary proceeding and making it impossible for plaintiff to prepare to confront the witnesses against it and to present evidence in its own behalf.

33. That by reason of the foregoing plaintiff has been deprived of its right to due process under the Fourteenth Amendment and suffers thereby the loss of its possessory interest in the premises and the forfeiture of its long term lease to the premises.

SECOND ACTION

34. Plaintiff repeats and realleges each and every allegation

contained in Paragraphs "1" through "32" with the same force as if fully set forth herein.

35. Upon information and belief that the trial Judge in the evication proceeding, the Appellate Term, First Department and the Appellate Division, First Department have conspired with defendant Realty Hotels, Inc. to discriminatorily apply and enforce the Landlord and Tenant Law of the State of New York, including Section 352 of the Multiple Dwelling Law, Section 231-1 of the Real Property Law, and Section 711-5 of the Real Property Actions and Proceedings Law, as well as the body of case law theretofore decided by the Courts of the State of New York, to deprive plaintiff herein of its property in violation of the equal protection provisions of the Fourteenth Amendment solely by reason of the fact that plaintiff was and is the operator on the premises of a leisure health spa, referred to by the trial Judge as a "massage parlor", upon their suspicions that unlawful sexual activity took place upon the demised premises and upon their prejudices against businesses offering massage to males by masseuses.

36. That the aforesaid discriminatory law enforcement caused the Trial Court and the Appellate Term, and Appellate Division of the First Department to totally ignore impair and annul the lease agreement between the parties which provided for notice and opportunity to cure in the case of any alleged conduct of the type alleged in the petition, to completely ignore the provisions of Section 352 of the Multiple Dwelling Law, directly

on point in the case, which made prostitution an optional grounds for terminating a lease at the nullifying the subsequently adopted MDL 352, to reverse without even mentioning its recent decision in 210 West 42nd Street v. Cohen, 60 Misc. 2d 983, 302 N.Y.S. 2d 404 to the contrary, which held that the said section made a lease voidable for illegality rather than void, and to ignore the consistent Case Law of the State of New York which provides that, except in the case of proceedings brought under 711-1 and 711-3 of the Real Property Actions and Proceedings Law, the acceptance of rent after commencement of the proceeding reaffirms the lease and negates the grounds for termination of the lease which may have existed prior to the acceptance of such rent.

37. This complete and utter disregard by the Courts of the State of New York of the body of Landlord and Tenant Law in the summary proceedings involving the plaintiff herein denied plaintiff its right to equal protection under the Fourteenth Amendment and effected a virulent discrimination against plaintiff, establishing plaintiff as a class of one for purposes of adjudication of its rights as a tenant.

38. Upon information and belief, that this discriminatory proceeding and law enforcement initiated by defendant Realty Hotels, Inc. and conspired in by the trial Judge, Appellate Term and Appellate Division of the First Department of the Supreme Court of the State of New York has uniquely treated the plaintiff herein as the first tenant ever to have been evicted from the premises in the

in the State of New York on the grounds if illegality without there having been served a governmental jeopardy notice upon the landlord and without there ever having been any governmental enforcement against the tenant by reason of the alleged illegal activity.

39. That by reason of the foregoing a judgment of eviction has been rendered against plaintiff, threatening plaintiff with dispossess from its premises, termination of its business, and forfeiture of its valuable long term leasehold, all in violation of plaintiffs rights to equal protection of the laws and to be free from discriminatory law enforcement as insured by the Fourteenth Amendment.

THIRD ACTION

40. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "32" of the instant complaint with the same force and effect as it fully sets forth herein.

41. That Section 711-5 of the Real Property Action and Proceeding Laws of the State of New York, facially and as applied, is violative of the Fourteenth Amendment of the United States Constitution in that it establishes a procedure for the summary eviction of tenants, including plaintiff herein, on grounds of illegal occupancy of demised premises, without providing for

adequate notice ot such tenants of the specific nature of the charges against them or even the time when, place where, or participants to the alleged illegality, thereby making it impossible for tenants, including plaintiff herein, to know the basis for the summary eviction proceeding, to investigate the alleged facts of illegality, to present evidence and witnesses in controversion of the evidence presented by landlords in such proceedings, to intelligently cross examine witnesses against them, and to otherwise prepare a defense in such proceedings, all in violation of the Civil Rights of tenants, including plaintiff herein, not to be deprived of their property rights without due process of laws.

42. That the said stature facially and as applied, permits the summary dispossess of tenants, including plaintiff herein, without requir ing proof of actual notice by such tenants of the allegedly illegal acts which are the basis of the said summary proceedings, and without a pretrial opportunity to be advised of and to discover the facts as to which such tenants, including plaintiff herein, are held to have constructive notice, thereby denying to such tenants including plaintiff, the right to be informed of the charges against them with sufficient certainty to meet such charges and in sufficient time prior to trial to investigate same and prepare a defense with relation thereto, all in violation of such tenants, including plaintiffs, rights not to

be deprived of their property without due process of law as insured by the Fourteenth Amendment.

FOURTH ACTION

43. Plaintiff repeats and realleges each and every allegation contained in Paragraphs "1" through "32" of the complaint with the same force and effect as if fully set forth herein.

44. That Section 231-1 of the Real Property Law of the State of New York is facially unconstitutional in that it voids leases embodying valuable property rights of tenants, including plaintiff herein, on grounds that the tenant is conducting an illegal trade, manufacture or other business, without regard to the nature of the illegal use, the continuity thereof, and the capacity or desire of the tenant to discontinue or abate such illegal use, whether inadvertent or not, upon being advised thereof.

45. That the said statute denies the tenants, including plaintiff herein, the right, provided in leases, including the lease of plaintiff herein, to receive notice of alleged illegality and to cure same, and thereby avoid the forfeiture of valuable property rights effected by the said statute.

46. That the said statute, as applied and as construed by the Courts of the State of New York, establishes an arbitrary and capricious discrimination between illegal uses involving sexual conduct and all other types of illegal uses in violation

of the equal protection clause of the Fourteenth Amendment, which discriminatory classification is neither justified nor supported by any rational governmental interest, by being construed to void leases involving sexual illegality, forbid the curing of such sexual illegality, suspend all laws relating to landlord's waiver by acceptance of rent with respect to such sexual illegality, ignore the curing of such sexual illegality prior to the commencement or adjudication of and in the summary proceeding, deny the right of a landlord to waive the forfeiture in the case of sexual illegality, all of which is not the case where non-sexual illegality is concerned.

47. That by reason of the foregoing the said statute, facially and as applied, denies to tenants, including plaintiff herein, the equal protection of the laws and to be free from discriminatory law enforcement as provided by the Fourteenth Amendment.

FIFTH COUNT

48. Plaintiff repeats and realleges each and every allegation contained in Paragraph "1" through "32" of the complaint with the same full force and effect as if fully set forth herein.

49. That the First, Ninth and Fourteenth Amendments of the United States Constitution protects the rights of all consenting adults to be free in their associations and, particularly, in those most personal aspects of their daily lives, their sexual

associations.

50. Upon information and belief, that with the exception of those laws of the State of New York, including and founded upon Section 230 of the Penal Law of the State of New York, those related to prostitution, no conduct involving the exercise of a fundamental right has ever been established as a crime or as the basis for the termination of valuable property rights merely because it is engaged in, in whole or part, for a commercial motive.

51. That Section 230 of the Penal Law of the State of New York which makes it a crime for two consenting adults to engage in sexual conduct for a fee and the resultant Sections 352 of the Multiple Dwelling Law and 231-1 of the Real Property Law which authorize the forfeiture of leases on the basis of such allegedly criminal activity, are unconstitutionally violative of the rights of plaintiff, its employees, and its patrons to promote, permit, and participate in the sexual association of consenting adults for a fee.

52. That the foregoing statues are overbroad in violation of the First Amendment in that they are founded upon a definition of prostitution as "engage in sexual conduct with another person in return for a fee" which includes the payment of any money, the purchase of any goods, or the rendering of any services, or the provisions of any resources from one adult person to another adult consenting person in connection with the performance of sexual

conduct as part of the relationship, i.e., the wining and dining of a woman for the purpose of fostering a relationship including sexual conduct, the payment of rent and other living costs of a woman for the purpose of fostering a relationship including sexual conduct, the employment of a woman in another capacity for the purpose of fostering a relationship including sexual conduct, in certain cases of repetitive marriages and divorces, to support a woman as a wife for the purpose of fostering a relationship including sexual conduct, and, as in the alleged case of plaintiff employees herein, voluntarily tipping a masseuse after alleged sexual conduct has transpired.

53. That the foregoing statutes are overbroad and otherwise inhibit the right of privacy of plaintiff, its employees and its patrons to engage in sexual conduct, one of the most fundamental areas of personal freedom, all in violation of the First, Ninth and Fourteenth Amendments.

54. That the right of plaintiff's employees and patrons to engage in sexual conduct is a fundamental right protected by the First, Ninth and Fourteenth Amendments which cannot be proscribed on the basis that such alleged activity is engaged in for a fee since any proscription of a fundamental right may be justified only by a compelling State interest and there is no such compelling State interest which would justify the foregoing statute and turn what is otherwise a fundamentally protected right into an illegal

activity merely because of the payment of a fee incidental to the alleged exercise of such fundamental right.

55. That the foregoing statutes violate the First, Fourth and Ninth Amendment rights of plaintiff, its employees and its patrons in allegedly exercising the fundamental rights heretofore referred to by means of legislative enactments which are not narrowly drawn to express only the legitimate State interest, if any, at stake.

56. That the foregoing statues deny the plaintiff, its employees and its patrons equal protection of the laws under the Fourteenth Amendment by outlawing a fundamental right, the right of consenting adults to engage in sexual conduct, merely because of the alleged payment of a fee incidental thereto, thus establishing a classification which satisfies no compelling State interest and which is not narrowly drawn to express only the legitimate State interests if any, at stake.

57. That the foregoing statutes violate the equal protection clause of the Fourteenth Amendment by proscribing one class of sexual activity, that engaged in without fee from another class, that engaged in for a fee, without any rational basis for such distinction, thereby depriving those who cannot otherwise secure a gratification for the basic sexual urges which they have without payment of a fee, from lawfully having sexual conduct in satisfaction of such basic sexual urges in the exercise of such fundamental constitutional rights.

58. That the words "fee" and "sexual conduct" are vague and overbroad under the 14th Amendment and chill the exercise of 1st Amendment rights to engage in fundamentally protected sexual relationships.

WHEREFORE, the plaintiff respectfully requests judgment against the defendants for the following relief:

1. For an order appointing and convening a Three-Judge District Court pursuant to Section 28 U.S.C. 2281 at 2284.

2. For declaratory judgment that Section 230 of the Penal Law Section 352 of the Multiple Dwelling Law, Section 231-1 of the Real Property Law, and Section 711-5 of the Real Property Actions and Proceedings Law are unconstitutionally violative of the First, Ninth and Fourteen Amendments on their face as applied, and, particularly, as applied to the rights of consenting adults to engage in sexual conduct, whether for a fee or otherwise.

3. For a temporary restraining order and preliminary injunction prohibiting the defendants, their agents and employees and all other persons acting in concert therewith from enforcing Section 230 of the Penal Law, Section 352 of the Multiple Dwelling Law, Section 231-1 of the Real Property Law, and Section 711-5 of the Real Property Actions and Proceedings Law with respect to Plaintiff, its employees, its patrons or for the purpose of evicting plaintiff from its premises at the Commodore Hotel by reason of any alleged sexual conduct on the part of plaintiff or its employees or patrons in violation of any or all of the foregoing statutes, or commencing any actions pursuant to such statutes pending the determination of this action.

4. For an order permanently enjoining the defendant, their agents, employees and all other persons acting in concert therewith from enforcing Section 230 of the Penal Law, Section 352 of the Multiple Dwelling Law, Section 231-1 of the Real Property Law, and Section 711-5 of the Real Property Action and Proceedings Law with respect to plaintiff, its servants, employees and patrons all for the purpose of dispossessing and removing plaintiff from their demised premises in the Commodore Hotel by reason of any alleged violation by plaintiff, its agents, servants, employees and patrons of the aforesaid statutes through the alleged performance of sexual conduct on the premises.

5. Awarding the plaintiff the costs of this action.

Dated: New York, New York
January 21, 1976

Kassner & Detsky
by [signature]

KASSNER & DETSKY, P.C.
Attorneys for Plaintiff
Office & P.O. Address
122 East 42nd Street
New York, New York 10017
Tel: (212) 682-6600

§ 230.05 Patronizing a prostitute

A person is guilty of patronizing a prostitute when:

1. Pursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or

2. He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him; or

3. He solicits or requests another person to engage in sexual conduct with him in return for a fee.

Patronizing a prostitute is a violation. L.1965, c. 1030, eff.

§ 230.10 Prostitution and patronizing a prostitute; no defense

In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that:

1. Such persons were of the same sex; or

2. The person who received, agreed to receive or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was a female. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 230.15 Promoting prostitution; definitions of terms

The following definitions are applicable to this article:

1. "Advance prostitution." A person "advances prostitution" when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

2. "Profit from prostitution." A person "profits from prostitution" when, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity. L.1965, c.

§ 230.20 Promoting prostitution in the third degree

A person is guilty of promoting prostitution in the third degree when he knowingly advances or profits from prostitution.

Promoting prostitution in the third degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 230.25 Promoting prostitution in the second degree

A person is guilty of promoting prostitution in the second degree when he knowingly:

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; or

2. Advances or profits from prostitution of a person less than nineteen years old.

Promoting prostitution in the second degree is a class D felony.

§ 230.30 Promoting prostitution in the first degree

A person is guilty of promoting prostitution in the first degree when he knowingly:

1. Advances prostitution by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another; or

2. Advances or profits from prostitution of a person less than sixteen years old.

Promoting prostitution in the first degree is a class C felony.

§ 230.35 Promoting prostitution; corroboration

A person shall not be convicted of promoting prostitution or of an attempt to commit the same solely on the uncorroborated testimony of a person whose prostitution activity he is alleged to have advanced or attempted to advance, or from whose prostitution activity he is alleged to have profited or attempted to profit. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 230.40 Permitting prostitution

A person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use.

Permitting prostitution is a class B misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

RELAXATION PLUS COMMODORE, INC.,

Plaintiff,

- against -

REALTY HOTELS, INC., THE HONORABLE EDWARD THOMPSON, Individually and as Administrative Judge of the Civil Court of the City of New York, and "John Doe", name unknown, Individually and as City Marshal of the City of New York,

Defendants.

- X

_____ C. I. V. _____

ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Decided

Upon a copy of the complaint and affidavits of CHARLES F. AXELROD AND HERBERT S. KASSNER, it is

ORDERED that the defendants above named show cause at a Term of this Court appointed to be held at the United States District Courthouse, located at Foley Square, in the City, County and State of New York, on the 27 day of January, 1976, at 10 AM of that day, or as soon thereafter as counsel can be heard, IN ROOM 115

Why an order should not be made as follows:

1. Appointing and convening a Three-Judge District Court pursuant to 28 U.S.C. 2201, 2281 and 2284 for the purpose of granting plaintiff's declaratory judgment that Section 230.00 et. seq. of N.Y.Penal Law, Section 352 of the New York Multiple Dwelling Law, Section 231-1 of the New York Real Property Law and Section 711-5 of the New York Real Property Actions and Proceedings Law are unconstitutional on their face and as applied in violation of the First, Ninth and Fourteenth Amendments of the United States Constitution in that:

a. Penal Law 230.00 is vague in violation of Fourteenth

Amendment due process, chills the exercise of First Amendment rights to privacy and association, is an overbroad proscription of a fundamental right to privacy and right of association in violation of the First Amendment, is an invasion of a fundamental right of privacy reserved to citizens under the Ninth and Fourteenth Amendments, effects a constitutionally impermissable classification without a rational nexus or compelling governmental interest in its proscription of a right, whether fundamental or not, to indulge in sexual conduct for a fee in cases where the indulgence in the same sexual conduct without a fee is not proscribed by law, broadly proscribes the exercise of a fundamental right to gratify one's sexual needs where the objects of such proscription, if any, could be more narrowly achieved through regularatory legislation rather than proscriptive legislation, in violation of the First, Ninth and Fourteenth Amendments, and establishes an invidious basis for discriminatory law enforcement by virtue of its overbreadth in violation of the First Amendment through its susceptibility of application and misapplication to fundamental protected activity well within a zone of privacy ensured and protected by the First, Ninth and Fourteenth Amendments.

b. RPAPL 711-5, MDL 352, and RPL 231-1, all of which have been applied and construed to warrant the eviction of a tenant from premises by reason of prostitution transpiring on such premises, are unconstitutionally violative of the First, Ninth and Fourteenth Amendments for the reasonsset forth in "a" above.

c. RPL 231-1 and RPAPL 711-5 are unconstitutionally violative of the due process provisions of the Fourteenth Amendment on their face and as applied to authorize the summary eviction of plaintiff from leased premises

without notice to such tenant of facts which would enable said tenant to know the grounds for the bringing of the proceeding, prepare its defense therein, cross-examine witnesses, and present evidence in its own behalf.

d. RPL 231-1, RPAPL 711-5, the entire body of landlord and tenant law of the State of New York relating to eviction for illegality and waiver by reason of reaffirmation of the lease through the acceptance of rent during the pendency of a summary proceeding, have been discriminatorily enforced by defendants against plaintiff in violation of plaintiff's rights under the equal protection clause of the Fourteenth Amendment, establishing plaintiff as a class of one and subjecting plaintiff to invidious and unlawful discriminatory law enforcement.

2. Enjoining defendants, their agents, servants and employees and all parties acting in concert with them, pending the determination of this action from taking any steps to evict or remove plaintiff from possession of its premises in the Commodore Hotel, in the City, County and State of New York pursuant to any judgment of eviction heretofore or hereafter instituted on grounds of illegal occupancy by reason of permitting prostitution on said premises or pursuant to proceedings heretofore had between plaintiff and defendant

3. Granting plaintiff such temporary relief as may be appropriate under 28 U.S.C. 1983, 1343, 2201, 2281 and 2284, and it is further

ORDERED, that ~~in the meantime and until the determination of this motion,~~ Let defendants, their agents, servants and employees, and all others acting in concert with them, be stayed from ~~in~~ anyway enforcing the provisions of ~~MDL 352, RPL 231-I,~~ RPAPL 711-5, and Penal Law ~~230.00, against plaintiff,~~ its

agents, servants or employees or evicting or removing plaintiff from possession of its premises at the Commodore Hotel, by reason of alleged illegal occupancy founded upon prostitution on the premises, pending the determination of plaintiff's motion for preliminary injunction herein, and it is further

ORDERED, that security in the amount of $ _____ be posted by _____ on January ___, 1976, and it is further

ORDERED, that personal service of a copy of this order and the papers upon which the same is granted, upon defendants on or before the 26 day of January, 1976, by _____ shall be sufficient service of this order.

Dated: New York, New York
January 26, 1976

Issued At: _____

_____
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

RELAXATION PLUS COMMODORE, INC.,

Plaintiff,

- against -

AFFIDAVIT

REALTY HOTELS INC., THE HONORABLE EDWARD THOMPSON, Individually and as Administrative Judge of the Civil Court of the City of New York, and "John Doe" (fictitious name) Individually and as City Marshal of the City of New York,

Defendants.

- X

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

HERBERT S. KASSNER, being duly sworn deposes and says:

He is a member of the firm of Kassner & Detsky, P. C., attorneys for plaintiff herein, and makes this affidavit in support of plaintiff's motion for a temporary restraining order, preliminary injunction and the appointment of a Three-Judge District Court.

Having exhausted all of its State remedies, and being faced with a final judgment of eviction, plaintiff may be removed and evicted from its place of business on 72 hours notice from a City Marshal, which notice if not already served, may be served at any moment. Should plaintiff be evicted, as it will be in the absence of a stay of this Court, this proceeding will be effectively mooted and plaintiff will have lost a valuable leasehold having approximately six more years left to its term and will have lost the $250,000.00 investment made in the said premises. The facts underlying the instant proceeding are as follows.

Plaintiff operates a relaxation spa on a portion of the mezzaine floor of the Commodore Hotel, 42nd Street and Lexington Avenue, New York, New York, under a ten year lease dated March 28, 1972 which provides for the payment of $27,000.00 annual rent, plus additional rent equal to the cost of electricity, which rent and electric payments are payable monthly on the first day of each month.

The said lease provides in Paragraph 41 thereof that:

> "Tenant shall conduct its business in a high class manner and in a way so as not to bring discredit, shame or opprobrium upon landlord or the hotels which landlord operates. Nor shall tenant, its agents or employees engage in any lewd or lascivious activities or behavior either on the demised premises or in any of the hotels operated by landlord. If the general manager of the Commodore Hotel should in the exercise of his reasonable judgment and discretion determine that tenant is in default of this paragraph, he shall notify tenant of such default as provided in Paragraph 17. If, however, tenant shoul notify landlord within the time provided to cure the default in Paragraph 17, that it is not in default, the parties shall settle the matter by arbitration before the American Arbitration Association in accordance with the rules then obtaining of the American Arbitration Association and judgment upon the award rendered may be entered in any Court having jurisdiction thereof."

Paragraph 17 of the said lease provides as follows:

> "(1) If tenant defaults in fulfilling any ove the covenants of this lease other than the covenants for the payment of rent or additional rent..., then,... upon landlord serving a written five (5) days notice upon tenant specifying the nature of said default and upon the expiration of said five (5) days, if tenant shall have failed to comply with or remedy such default, or if the

> said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within the said five (5) day period, and if tenant shall not have diligently commenced curing such default within such five (5) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then landlord may serve a written three (3) days notice of cancellation of this lease upon tenant, and upon the expiration of said three (3) days, this lease and the term thereunder shall end and expire as fully and completely as if the expiration of such three (3) day period were the day herein definitely fixed for the end and expiration of this lease and the term thereof and tenant shall then quit and surrender the demised premises to landlord but tenant shall remain liable as hereinafter provided.
>
> (2) If the notice provided for in (1) hereof shall have been given, and the term shall expire as aforesaid;...then ...landlord may without notice, reenter the demised premises either by force or otherwise, and dispossess tenant by summary proceedings or otherwise,..."

In the two and one-half years of occupancy under the aforesaid lease, defendant Realty Hotels, Inc., the landlord, and tenant appeared to have had no difficulty in their relations with each other with the exception of one isolated instance in March of 1973 when a letter was written by landlord relating to an advertisement of tenant. Rent and additional rent were always paid promptly.

In July, 1974, for reasons unknown to plaintiff at that time, landlord, without any notice whatsoever, commenced a summary proceeding to dispossess plaintiff from the premises. When these proceedings were withdrawn

without prejudice in September, landlord had already commenced a second dispossess proceeding which was withdrawn near the end of September, 1974. The instant proceeding was commenced in October of 1974 and sought the removal of plaintiff from the premises on the ground that the premises "are used and occupied by the respondent, or with the knowledge and consent of the respondent, as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for other illegal business or use." (Paragraph 9 of landlord's petition). Ex. I.

It cannot be overemphasized that plaintiff had been in the premises for a period of approximately two and one-half years during which time their business had been licensed by the Consumer Affairs Department of the City of New York and their masseuses had obtained licenses under the New York City Massage law (which has been ruled unconstitutional), there had not been one instance of police enforcement at the premises, there had been no complaints by customers of any illegality at the premises, landlord's roomers who had utilized the services of plaintiff had failed to make any complains and had charged the cost of plaintiff's services to their rooms, and the premises had enjoyed a singularly high reputation as a leisure spa in the City of New York. It was only after the impending transfer of ownership of the hotel with an announced multi-million dollar renovation of the hotel came to the attention of plaintiff and explained the course of conduct of landlord in attempting to evict one of its best rent paying tenants from the hotel. Rather than negotiate the purchase of the seven and one-half year balance of plaintiff's term under the lease, landlord employed a law firm with an associated private detective agency (owned in whole or in part by at least one of the partners in such law firm) to make a case for eviction.

At the trial landlord presented six private detectives whom it employed for the purpose of establishing a case for eviction. These private detectives testified that they came to the premises on nine occasions over an approximately one-half year period, engaged eight girls to commit sexual acts, and gave the girls tips for such acts. It is notable that there was no testimony by appellees that these were the only men sent to the premises or that these were the only occasions that these men entered the premises.

It is also notable that the sole attempt by landlord to connect plaintiff to the alleged acts of misconduct by the eight girls employed by appellant was the testimony of one such private detective that on one occasion he was advised by a receptionist that an individual pointed out by her as the manger of the premises who was not otherwise identified, told this private investigator that it was possible to procure an act of masturbation or felatio in the premises, but it was impossible to procure an act of intercourse. On the basis of this alleged statement to a hired entraper of landlord, it was sought to establish that the officers, directors and stockholders of plaintiff had constructive notice that illegal acts were habitually and customarily performed on the premises.

To place the foregoing in its true perspective, it is necessary to outline the testimony relating to the extent of services and number of employees at the premises during the period in question. Plaintiff invested approximately $250,000.00 in renovating what was a barber shop in the space at the Commodore Hotel. Approximately 18,000 massages are performed annually. Some 250 employees are employed by plaintiff at the premises each year with fifty girls being employed as masseuses at any one point in time.

In view of the foregoing, assuming the private dtectives of landlord were telling the truth, the trial produced testimony that during a particular six month period in 1974, one out of each one thousand massages given at the premises resulted in illegal activity and one out of each fifteen or sixteen girls employed during that period disobeyed the printed house rules and the instructions of management and was entraped into performing unlawful sexual acts in the hope of obtaining a larger tip from which neither plaintiff nor its management received one penny and as a result of which plaintiff is faced with the forfeiture of its extremely valuable leasehold and an investment of appoximately $250,000.00.

Let it be thought that management did not carefully screen all of tis masseuses prior to employing them, the record established that extensive applications were made out by applicants for employment, these were checked, fingerprinting was had in connection with applications for masseuse licenses in order to insure that the girls had no police records and even lie dtector tests were given in an attempt to assure that the girls would not go into business for themselves behind the private locked doors of their respective massage rooms. All that could have been done was done to assure that the operation of plaintiff at the premises would accord with the requirements of Paragraph 41 of the lease.

All that the testimony of landlord's paid entrapers established was that there may be circumstances under which legitimate, hard working intrinsically honest and moral women will be induced to perform sexual acts when "the price is right".

Landlord, however, did not seek to obtain plaintiff's compliance with Paragraph 41 of the lease. It gave no notice as required therein. It sought forfeiture rather than compliance. It sent its paid enticers, its

paid witnesses, into plaintiff's premises. It did not seek a police investigation which would be impartial. It did not seek an investigation by the Department of Consumer Affairs, the governmental body which licenses plaintiffs premises for it did not want an impartial investigation of plaintiff's business. It was the testimony of professional paid witnesses not of disinterested public officials which landlord required and sought.

When, on the very morning of trial, plaintiff was first apprised of the names of their employees who had allegedly committed unlawful acts on the premises, the dates when such acts were allegedly committed, and the perrons with whom such acts were allegedly committed, the attorney for plaintiff sought a one day adjournment in order to investigate the claims. This was denied and the trial commenced immediately. By reason of the foregoing, it was impossible to prepare adequate cross-examination of the six private detectives or to prepare an adequate defense to their claims. Since well over one hundred girls were employed during the period of the alleged misconduct and only first names were given, the task of investigating these claims involving girls who could very well have no longer been in the employ of plaintiff at a time when the officers of plaintiff were actually in Court in the midst of the trial, became impossible. It cannot be overemphasized that a demand for the bill of particulars was served upon landlord on October 25, 1974, 53 days prior to the service thereof in the morning of trial, which demand was essentially identical to that which was served on plaintiff in the previous two dismissed proceedings, yet the bill of particulars was served upon plaintiff in Court after ten o'clock in the morning on Ddecember 17, 1974, the date of trial. Not only did the Judge deny an application for a one day adjournment to investigate the allegations of the

bill of particulars, the first statement by landlord of the facts of the alleged misconduct, but landlord told the jury that tenant had or should have had knowledge of these facts and did nothing about them and the trial court, in his decision adjudicated a forfeiture without opportunity to cure on the basis of a finding that plaintiff should have had knowledge of the charges and did nothing about them. Without the hard facts of the allegations, the names and times, it was impossible for plaintiff to investigate the allegations. Asking all of the over one hundred employees who had been employed as masseuses over the prior six months whether they had performed unlawful acts would have served no purpose since admissions would have resulted in immediate dismissals and this was known to the girls. Furthermore, less than half of the girls were still employed by plaintiff at the time of trial.

By reason of the foregoing, plaintiff could do little more at the trial then set forth its attempts to insure that its masseuses would be the type of women who would not be inclined to commit unlawful acts and that whatever acts could be taken to insure that they would not do so had been taken. It was virtually impossible to do the investigation necessary to insure a probing cross-examination of landlord's hired professional witnesses or to controvert their testimony. Thus, by a combination of landlord's tactical maneuver in waiting fifty-three days, until the morning of trial before serving its bill of particulars, and the Judge's failure to grant a one day continuance to allow investigation of the facts first gleaned therefrom, plaintiff was totally incapacitated from prearing and presented an adequate defense to the charges. It is respectfully submitted that even summary proceedings are not exempt from the minimal requirements of due process.

As has been noted heretofore, the lease provides for the payment of $27,000.00 rent per annum in monthly installments of $2,250.00. In addition, Paragaph 40 of the lease provides for the sale of electricity to the tenant on a rent inclusion basis at the rate of $275.00 as follows:

> "40...(c) Electricity - Tenant shall have the option of: ...(3) Purchasing electricity from landlord through its existing facilities on a rent inclusion basis. The amount to be included as rent to be determined by a mutually satisfactory or agreed to electrical engineer and reappraised every year during the term of the lease," (Underlining Supplied)

Landlord's comptroller admitted at the trial that in August, 1974 plaintiff paid to landlord the rent of $2,250.00 and the $275.00 for electricity. He further testified that in September landlord charged for the account of the plaintiff the additional sum of $2,250.00 as rent and $275.00 as electricity. He further testified that on October 23, 1974 landlord accepted $275.00 for electricity and on October 31, 1974 landlord accepted $550.00 for electricity and $2,250.00 as rent. He stated that the rent was credited for the month of September, 1974, a month during which landlord refused to accept rent from plaintiff. A check for $2,250.00 and another check fo $275.00 payable in November, 1974 was acknowledged by the comptroller who said that the sum was credited for rent during the month of October, 1974.

Since the said eviction proceedings were brought on by a petition verified October 22, 1974 which was served on or about October 25 or 26, 1974, the October 23, 1974 payment of $275.00 described in the lease as "rent" was accepted by the landlord prior to the commencement of the said proceedings and after each of the alleted illegal acts described in its bill of particulars took place. The acceptance of rent payments and additional rent inclusion

electricity payments after the commencement of the proceedings similarly and naturally took place after landlord knew of all of the alleged acts of illegality which served as the basis for the said proceeding. It is, therefore, abundantly clear that landlord demanded, received and accepted rent with complete knowledge of the alleged illegal acts both prior to and after the commencement of the instant proceeding which acceptance has always been held under New York law to constitute a reaffirmation of the lease nullifying the proceeding below.

At the trial, the Judge ruled that under RPAPL 711-5 a summary proceeding for illegality could be maintained by the landlord without notice and without compliance with the lease agreement requiring such notice. He further held that there could be no waiver by a landlord of illegal occupancy and, consequently, acceptance of rent by the landlord after the commencement of the summary proceedings and after knowledge of the alleged illegal occupancy did not reaffirm the lease and terminate the proceeding. A judgment of eviction was rendered.

Plaintiff immediately appealed to the Appellate Term of the Supreme Court of the State of New York, First Department and applied to both the trial Judge and the Appellate Term to fix the amount of an undertaking, which, if posted, would grant an automatic stay pursuant to the provisions of CPLR 5519 (a)6. Both applications for the performance of the aforesaid ministerial act were denied. Plaintiff thereupon commenced Mandamus proceedings in both the Appellate Division, First Department and the Supreme Court, New York County to compel the aforesaid Appellate Term and Trial Court respectively to perform the ministerial act of setting the amount of the undertaking. Prior to the return date of each of the respective motions in such Mandamus proceedings, the Trial

Court fixed an undertaking.

The appeal before the Appellate Term, First Department was duly perfected and argued. Among the issues argued were the following:

1. The landlord's service of a bill of particulars fifty-three days after demand therefor and one hour before jury selection, which bill of particulars set forth for the first time the names and times of the participants and occurences of illegality which was the basis for the summary proceeding, combined with the failure of the Trial Court to grant a one day continuance sought by the tenant, constituted an abuse of discretion rising to the magnitude of due process denial by effectively preventing the tenant, charged with constructive notice of the alleged illegality, from preparing a defense, cross examining adverse witnesses, and presenting witnesses in its own behalf.

2. Tenant's acceptance of rent subsequent to notice of the alleged illegality and after commencement of the summary proceeding constituted a reaffirmation of the lease, vitiating the summary proceeding.

3. RPAPL 711-5, being remedial rather than substantive in nature, does not abrogate the provisions of the lease agreement relating to termination nor does it establish the substantive right to terminate for illegality which substantive right can only be found in the lease or in such statutory provisions as Multiple Dwelling Law 352 (makes a tenancy of all or a portion of a multiple dwelling in which prostitution is practiced terminable at the option of the landlord) or Real Property Law 231-1 (as construed by the recent Appellate Term, First Department case of 220 West 42nd Associates v. Cohen, 60 Misc. 2d 983, makes a tenancy voidable at the option of the landlord

by reason of illegal occupancy).

4. The petition is jurisdictionally defective by failing to state facts upon which it is based.

The Appellate Term, First Department rendered its decision affirming the judgment of eviction below, devoting virtually all of its opinion to Point 3 above with a short statement relating to Point 2 and a determination that no other issue was worthy of comment.

The Appellate Term decision agreed with the tenancy that RPAPL 711-5 is remedial in nature, but found that RPL 231-1 superseded the lease agreement between the parties and voided the lease for illegality, requiring no notice of termination. It thus reversed its recent decision in the Cohen case (which held that the word "void" in RPL 231-1 meant "voidable") without even mentioning or distinguishing that case, and ignored completely Multiple Dwelling Law 352 which concerns itself exclusively with the factual pattern of the instant case, an allegation of prostitution in all or a portion of a multiple dwelling. Upon reargument it was pointed out to the Appellate Term that MDL 352 which was adopted long after RPL 231-1 and which made a tenancy of all or a portion of a multiple dwelling in which prostitution takes place "terminable at the election of the lessor", a meaningless statutory enactment if RPL 231-1 is construed to void just such a lease. This had no effect upon the Appellate Term.

As to the issue of acceptance of rent which had always been held to reaffirm the lease and terminate any summary proceedings, all the Appellate Term said was that illegality can never be waived. When it was pointed out to the Appellate Term on application for reargument that the

tenant was not claiming that the landlord, by acceptance of rent, had waived illegality for the term of the lease, but that it had merely reaffirmed the lease for such acts of illegality as form the basis for the pending summary proceeding, the Appellate Term refused to reconsider. When it was pointed out to the Appellate Term that this was the first case in New York juris prudence which had held this way on the foregoing two issues with regard to a premises that had never been subjected to any law enforcement and whose landlord had never been subjected to any jeopardy notice by any governmental authority, this made no impression upon the Appellate Term. When the Cohen case, decided shortly before the instant case, was ignored in the Appellate Term decision despite its findings that RPL 231-1 established a lease as "voidable" and not "void" for illegality and held that the landlord had waived the illegality by acceptance of rent, the Appellate Term refused to reconsider its decision. As was noted heretofore, the Appellate Term decision discussed no other issues.

A motion for leave to appeal to the Appellate Division was first denied, but upon reargument was granted, with Judge Lupiano stating that the issues were worthy of a written opinion.

The result of the foregoing was a judgment of the Appellate Division affirming the judgment of eviction upon the opinion of the Appellate Term. A motion for leave to appeal to the Court of Appeals was denied by the Appellate Division and plaintiff has exhausted its State remedies since the Court of Appeals cannot entertain a motion for leave to appeal to it from a judgment rendered in the Civil Court in the City of New York. On appeal as *

By reason of the foregoing it is respectfully submitted that an extremely valuable property right of the plaintiff herein is threatened with

* of right has been taken to the N.Y. Court of Appeals which establishes a stay pursuant to CPLR 5519 (a) 6, (d) and (e) but this has been ignored by defendant who has caused Marshall Alex Chapin to serve a 72 Hour Notice of Eviction January 26, 1976.

eminent destruction by virtue of eviction from a premises in which plaintiff has a $250,000.00 investment and as to which plaintiff has over six years remaining on its lease. This has been accomplished by discriminatorally enforcing each of the foregoing statutes against the plaintiff in contravention of all prior constructions and all precedents. It has been accomplished through a denial to plaintiff of an opportunity to adequately defend itself against the charges brought against it in the Civil Court of the City of New York. It has been accomplished by unconstitutionally applying the statutes to deprive plaintiff of both procedural and substantive due process. It has been accomplished by construing the statutes to abrogate the property right of plaintiff incorporated in its lease to the premises.

Lastly, conceding arguendo the findings of sporatic acts of sexual conduct between plaintiff's employees and the paid entrapers of the landlord, which resulted in tips given by such entrapers to such employees, none of which was paid over to plaintiff, its officers, directors or shareholders, plaintiff respectfully urges upon this Court that such acts by plaintiff's employees were not illegal in view of the fact that the prostitution provisions of the Penal Law of the State of New York and the resultant civil disabilities provided in RPL 231-1, MDL 352 and RPAPL 711-5 upon which eviction of plaintiff is threatened are unconstitutionally violative of the First, Ninth and Fourteenth Amendments in that they proscribe fundamental rights of association founded upon a classification based upon the payment of a fee without a compelling governmental interest justifying such classification, are vague, are overbroad, impinge upon a basic right of privacy, proscribe the gratification of a basic need without a

rational nexus, and proscribe the exercise of a fundamental right to accomplish legitimate State interests, if any, which could be accomplished through narrower regulatory legislation.

No prior application has been made for the relief sought herein.

Sworn to before me this

22 day of January, 1976

SEYMOUR S. DUTSKY
NOTARY PUBLIC, State of New York
No. 31-0742242
Qualified in New York County
Commission expires March 30, 1977

HERBERT S. KASSNER

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

JOHN D. MURPHY, Agent of
REALTY HOTELS, INC.,

Petitioner (Landlord),

-against-

RELAXATION PLUS COMMODORE, LTD.
Hotel Commodore
New York, New York,

Respondent (Tenant).

PETITION FOR REMOVAL OF TENANT (ILLEGAL USE-BUSINESS)

The petition of JOHN D. MURPHY respectfully shows that:

1. Petitioner is authorized to institute and maintain this proceeding and is the Agent in respect to the premises hereinafter described of Realty Hotels, Inc., the owner and landlord of the premises hereinafter described.

2. Upon information and belief, that at all times herein mentioned, the respondent was and still is a business corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the respondent is the tenant of the premises hereinafter described, who entered in possession thereof under a written rental agreement made on or about the 28th day of March 1972 between said respondent and the landlord for the term

of ten years, pursuant to which written agreement the said premises were rented to the respondent for use as a relaxation spa.

4. The premises from which removal is sought consists of all that certain space formerly known as The Commodore Barber Shop and Beauty Shop, located in the northwest corner of the mezzanine floor, consisting of approximately 3,590 square feet, more or less, as shown in black outline on the plan attached hereto as Exhibit A, in the building known as The Hotel Commodore, 109-22 East 42nd Street, at the intersection of Park Avenue and East 42nd Street, New York, New York.

5. That the aforementioned premises is located at Park Avenue and East 42nd Street, and is known as Number 109-22 East 42nd Street, New York, New York, and is situated within the territorial jurisdiction of the Civil Court of the City of New York, County of New York.

6. That the said Hotel Commodore is a building used and occupied as a hotel and as a "Class B" multiple dwelling occupied as a more or less temporary abode of three or more individuals or families living independently of each other; and that pursuant to the Housing Maintenance Code Article 41 thereis a currently effective registration statement on file with the Office of Code Enforcement in which the owner has designated the managing agent named below, a natural person over 21 years of age, to be in control of and

responsible for the maintenance and operation of the building:

Multiple Dwelling Registration Number 107905; Registered Managing Agent's Name-John D. Murphy; Business Address: 109-22 East 42nd Street, New York, New York; Telephone Number: MU 6-6000.

7. That subsequent to the execution of the aforementioned lease agreement, the respondent entered into possession of the said premises and is now in possession thereof.

8. That pursuant to the terms of the said lease agreement, the respondent agreed to pay to the landlord during the demised term the sum of $27,000 per annum in equal monthly installments of $2,250 each, payable in advance on the first day of each month during the said term.

9. That the said demised premises are used and occupied by the respondent, or with the knowledge and consent of the respondent, as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for other illegal business or use in that the respondent, its agents, servants or employees, are using or occupying the said premises, or causing or permitting the said premises to be used and occupied, for the purposes of advancing, profiting from and promoting prostitution or knowingly permitting prostitution in the said premises; which prostitution consisted and consists of sexual conduct engaged in, for a fee, by persons in the employ of the respondent, with patrons of the respondent, in said premises, said sexual conduct consisting of acts of fellatio, masturbation and physical

contact with the unclothed genitals of patrons of the respondent for purposes of sexual gratification.

10. That the said respondent continues in the possession of said premises, and uses and occupies said premises as such bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for such other illegal business or use, all without the permission of the said landlord.

11. That the demised premises were leased to the respondent and are used or occupied by the respondent solely for business purposes, and not for dwelling purposes; and by reason thereof the said premises are not subject to the Rent Stabilization Law of 1969.

12. That by reason of the premises the Landlord has not, since the 30th day of August, 1974, accepted rent from the respondent for the respondent's occupancy of the said premises.

13. That your petitioner lacks written information or notice of any address where the respondent tenant has its principal office or place of business in the State of New York, other than the address of the property sought to be recovered.

WHEREFORE, your petitioner prays for judgment awarding to the landlord the possession of said premises together with damages for such illegal occupancy,

and with the costs of these proceedings, and for a warrant to remove said respondent from possession of said premises.

Dated: New York, N.Y.
October 11, 1974

JOHN D MURPHY
JOHN D. MURPHY, Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - Doe - - - - - - - - - - - - - - - X

RELAXATION PLUS COMMODORE, INC.,

Plaintiff,

AFFIDAVIT

- against -

REALTY HOTELS, INC., THE HONORABLE EDWARD THOMPSON, Individually and as Administrative Judge of the Civil Court of the City of New York, and "John Doe", name unknown, Individually and as City Marshal of the City of New York,

Defendants.

- X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CHARLES F. AXELROD, being duly sworn, deposes and says:

1. I am an associate of the law firm of Kassner & Detsky, P. C., attorneys for the plaintiff herein.

2. On January 26, 1976 I contacted the office of Louis J. Lefkowitz, Attorney General of the State of New York. I spoke to Mrs. Walker, Secretary of Litigation and informed her that at 4:00PM today our office would be applying to this Court for a temporary restraining order in connection with the bove captioned matter; she informed me that an attorney from her office would be present at 4:00PM in the office of the cashier.

3. On January 26, 1976 at approximately 3:20PM I spoke with Mr. Leonard Krim, Esq., attorney for Realty Hotels, Inc., and informed him that at approximately 4:00PM we would be moving for a temporary restraining order in

connection with this matter as well. He informed me that he will be present in the cashier's office at 4:00PM.

Sworn to before me this
26th day of January, 1976

Charles F. Axelrod
CHARLES F. AXELROD

NOTARY

Commission

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RELAXATION PLUS COMMODORE, INC.,

Plaintiff,

- against -

REALTY HOTELS, INC., EDWARD THOMPSON (The Honorable) Individually and as Administrative Judge of the CIVIL COURT OF THE CITY OF NEW YORK, "JOHN DOE" (fictitious name) Individually and as City Marshal of the CITY OF NEW YORK,

Defendants.

#41838-17

OPINION

76 Civ. 425 (HFW)

HENRY F. WERKER, D. J.

Plaintiff by order to show cause moves this court for a preliminary injunction and the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2201, 2281 and 2284 for the purpose of granting plaintiff a declaratory judgment that Section 230.00 et seq. of the New York Penal Law, Section 352 of the New York Multiple Dwelling Law, Section 231.1 of the New York Real Property Law and Section 711.5 of the New York Real Property Actions and Proceedings Law are unconstitutional on their face and as applied in violation of the First, Ninth and Fourteenth Amendments of the United States Constitution..

This case arises out of circumstances involving a summary proceeding brought by the defendant Realty Hotels, Inc. against the plaintiff here in the Civil Court of the City of New York upon the grounds set forth in § 711.5 of the New York Real Property Actions and Proceedings Law.[1] That section permits a landlord to commence a summary proceeding against a tenant where the premises are used

or occupied as a bawdy-house, or house or place of prostitution or for any illegal trade or manufacture or other illegal business.

This proceeding was brought in October 1974. A demand for a bill of particulars was served upon the landlord on October 25, 1974. Fifty-three days later on December 17, 1974 the case was called for trial and on that day a bill of particulars was first served upon plaintiff. Plaintiff's counsel requested a continuance on that day of one day so that he could investigate the allegations of misconduct contained in the bill. Those allegations were later substantiated by the testimony of six private detectives who testified that they attended plaintiff's premises over approximately one-half year, engaged girls to commit sexual acts and gave the girls tips for such acts. This application was denied. The plaintiff was required to go to trial, and a judgment was granted to the defendant. An appeal was taken to the Appellate Term which affirmed the judgment and then to the Appellate Division, First Department which also affirmed the judgment. Leave to appeal to the Court of Appeals was denied but the plaintiff has taken an appeal to the Court of Appeals as of right under Article I, Section 6 of the New York State Constitution.[2] Such an appeal establishes a stay pursuant to the New York C.P.L.R. §§ 5519(a)6, (d) and (e). A stay is now in effect although not recognized as such by counsel for Realty Hotels, Inc., and an appeal is pending in the Court of Appeals.

Plaintiff has based its complaint on 28 U.S.C. §§ 1331, 1332, 1343, 2201, 2202, 2281 and 2284, on 42 U.S.C. §§ 1983, 1985 and 1986 and on Rules 57 and 65 of the Federal Rules of Civil Procedure.

The claims are deprivation of due process, conspiracy by the courts involved to discriminatorily apply and enforce the laws mentioned as against plaintiff, and the consequent unconstitutionality of those statutes.

In the first instance I am of the opinion, for purposes of plaintiff's demand for the convening of a three-judge court, that there is no case or controversy here involved as between any officer of the state and the plaintiff. The defendant Edward Thompson is not alleged to have committed any act which has resulted in the claims made by plaintiff. His position as administrative judge does not make him responsible for the acts of judges under his supervision. The unknown marshal of the City of New York is simply an officer appointed to carry out the mandates of the courts. His duties are administrative. The action threatened, namely eviction, is simply a result of the court's judgment over which the marshal has no control.

Plaintiff's case in essence is one requesting this court to review the actions taken by the trial court, the Appellate Term and the Appellate Division. Its charge against these courts of conspiracy to discriminatorily apply and enforce these laws is patently absurd.[3]

While the United States Supreme Court has held that an action brought under 42 U.S.C. § 1983 was within one of the exceptions of 18 U.S.C. § 2283 (the anti-injunction statute), Mitchum v. Foster, 407 U.S. 225 (1972), I am aware of the caveat expressed in the Chief Justice's concurring opinion as follows:

> But, as the Court's opinion has noted, it does nothing to 'question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.' . . . We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings. Id. at 244 (Burger, C.J., concurring) (emphasis in original).

The case of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), further indicated that the doctrine of Younger v. Harris, 401 U.S. 37 (1971), would be extended to cases involving quasi-criminal proceedings in state courts. The case at

bar while it does not originate in a criminal proceeding, originates in the public policy of New York to permit the eviction of tenants using or occupying premises for illegal purposes. It might be said to be quasi-criminal or punitive in nature upon analogy to the Huffman case which involved public nuisance. The more recent case of Rizzo v. Goode, 44 U.S.L.W. 4095 (U.S. Jan. 20, 1976), is further affirmation that principles of federalism and equity are to be considered. As I have previously indicated, a present action is still pending and that reason, as well as the absurdity of this court reviewing the actions of each of the state courts, demands that I stay my hand in this matter.

Plaintiff's claim that Section 230.00 of the Penal Law of the State of New York is unconstitutional is frivolous.[4]

As was said in Roth v. United States, 354 U.S. 476, 491 (1957)

> " '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' "

This is not a case which comes under the protection of cases such as Stanley v. Georgia, 394 U.S. 557 (1969), or Griswold v. Connecticut, 381 U.S. 479 (1965). Stanley dealt with "freedom of thought and mind in the privacy of the home" United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971) and Griswold with "the protection of the private sexual matters of married persons from unwarranted governmental intrusions." United States v. Caesar, 368 F. Supp. 328, 334 (E.D. Wisc. 1973), aff'd sub nom., United States v. Harden, 519 F.2d 1405 (7th Cir. 1975) (mem.). The facts of the case at bar arose in a commercial setting and involve the regulation of prostitution in a public building. The Supreme Court has specifically approved state regulation of such conduct. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). Furthermore when sections 2421 and 2422 of the

Mann Act, which prohibit conduct relating to interstate travel for "prostitution or debauchery, or for any other immoral purpose," were challenged as vague, their constitutionality was upheld. United States v. Caesar, supra. See also Cleveland v. United States, 329 U.S. 14 (1946); Caminetti v. United States, 242 U.S. 470 (1917); United States v. Tyler, 459 F.2d 647 (10th Cir.), cert. denied, 409 U.S. 951 (1972).

While Steffel v. Thompson, 415 U.S. 452 (1974), holds that it is not necessary to demonstrate irreparable injury in an action seeking declaratory relief, it is my opinion that in this case the plaintiff cannot overcome "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 243 (1972) (Burger, C.J., concurring). See also Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

On the face of the papers as submitted, this court cannot conclude that there is no adequate remedy at law for the plaintiff here. Even if the Court of Appeals sustains the eviction of the plaintiff in this case, the terms of plaintiff's lease provided in ℙ 41 that if the general manager of the hotel found that the tenant or its agents or employees engaged in any lewd or lascivious behavior it would notify the tenant of the default and give the tenant the opportunity to cure the default under ℙ 17 of the lease. It further provided that the parties would settle the question of default by arbitration before the American Arbitration Association. There is nothing in the papers which indicate that the plaintiff interposed a counterclaim for breach of contract of the lease. However, it appears that the tenant was not given the opportunity to cure its default, if any, under this paragraph of the lease, and it is reasonable to suppose that this constitutes breach of the lease contract by the landlord. Furthermore, the plaintiff is currently appealing to the Court of Appeals, an appeal with which this court should not interfere, even where the appellant does not believe his chances to be auspicious.

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In any event, if the plaintiff's position is vindicated in the Court of Appeals or if it institutes breach of contract proceedings against the landlord, the value of the balance of the lease can be appraised and awarded. The plaintiff itself in its papers acknowledges that an alternative originally available to the landlord was to buy out the remaining term of the lease. It is thus this court's conclusion that whatever damage this plaintiff suffers, if any, can be fully compensated with money damages. In such an instance, it would not be proper to grant equitable relief.

From all of the foregoing I have determined that no substantial federal question has been raised by plaintiff's complaint. Injunctive relief is denied and the convocation of a three-judge court is denied. The complaint is dismissed.

SO ORDERED.

DATED: New York, New York
February 4, 1976

Henry F. Werker
U. S. D. J.

RELAXATION PLUS COMMODORE, INC. v. REALTY HOTELS, INC., 76 Civ. 425

NOTES

1. "An occupant of one or more rooms in a rooming house in a city having a population of one million or more, who has been in possession for thirty consecutive days or longer is a tenant under this article; he shall not be removed from possession except in a special proceeding. A special proceeding may be maintained under this article upon the following grounds:

. . .

5. The premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business."

See also New York Real Property Law § 231.1:

"Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied."

and New York Multiple Dwelling Law § 352:

"If a multiple dwelling, or any part thereof, shall be used as a house of prostitution or assignation with the permission of the lessee or his agent, the lease shall be terminable at the election of the lessor, and the owner shall be entitled to recover possession of said premises by summary proceedings."

2. Art. I, § 6 of the New York State Constitution provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a

witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law."

3. This is not a case like Yick Wo v. Hopkins, 118 U.S. 356 (1886) in which the facts, presenting the contested ordinance in actual operation,

> "establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus respesenting the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Id. at 373.

4. Section 230.00 provides that "[a] person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." This statute was upheld as constitutional on the ground that the word "fee" and the term "sexual conduct" are not impermissibly vague. People v. Block, 71 Misc. 2d 714, 337 N.Y.S.2d 153 (Nassau Cnty. Ct. 1972). The court held that "fee" means payment in return for professional services rendered and "sexual conduct" means "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast," as defined in §235.20(3) of the New York Penal Law. (emphasis added).